2009

State of Utah v. Tevita F. Tafuna : Brief of Appellant

Utah Court of Appeals

Ronald Fujino; Law Office of Ronald Fujino; Counsel for Appellant.
Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20090105-CA
TEVITA F. TAFUNA,	:	Priority No. 2
Defendant/Appellant.		

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Robbery, a First Degree Felony, in violation of Utah Code Ann. § 76-6-302, in the West Jordan Department of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Stephen Roth, presiding. The defendant is currently incarcerated at the Utah State Prison.

LAW OFFICE OF RONALD FUJINO
Ronald Fujino (5387)
4764 South 900 East Suite 2
Salt Lake City, Utah 84117
Attorney for Defendant / Appellant

MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff / Appellee

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Ronald Fujino (5387)
4764 South 900 East Suite 2
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MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff / Appellee

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §§ 77-18a-1(1)(a) and 78A-4-103(2); and Utah R. App. P. 3(a).

ISSUES, STANDARD OF REVIEW, AND PRESERVATION

1. Did the trial court err (and/or was defense counsel ineffective) in failing to exclude an juror who had improper contact with a witness based on Utah's stringent rule that shifts the burden to "the prosecution to prove that the unauthorized contact did not influence the juror[,]" *State v. Pike*, 712 P.2d 277, 281 (Utah 1985), particularly since an untainted alternate juror was available?

Preservation: The improper contact between the juror and the witness was brought to the court's attention, R 289:3-4, although the juror was allowed to remain on the panel and ultimately became the jury foreman. R 317. In the alternative, for unpreserved issues, the matter may be reviewed under the doctrines of plain error, manifest injustice, or ineffective assistance of counsel. *State v. Morgan*, 813 P.2d 1207, 1210-11 (Utah App.

1991); *State v. Casey*, 2003 UT 55 at ¶ 40, 82 P.3d 1106 ("'[M]anifest injustice' has been defined as being 'synonymous with the "plain error" standard.'"); *see also Casey*, 2003 UT 55 at ¶ 41 (The manifest injustice or the plain error standard requires the appellant to show that "'(I) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.'"); *see also Myers v. State*, 2004 UT 31, ¶ 20, 94 P.3d 211 ("To establish ineffective assistance of counsel, 'a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'"). "When an ineffective assistance of counsel claim 'is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.'" *State v. Isiah Bo'Cage Vos*, 2007 Ut App 215, ¶9 (Utah App 2007) (citations omitted).

2. Did the trial court err in not granting Mr. Tafuna's motion for a mistrial after information – which the parties previously had agreed should be excluded, was then improperly admitted for the jury's consideration? "We review a denial of a motion for mistrial for abuse of discretion." *State v. Shipp*, 2004 UT App 40 (Utah App. 2004), *rev'd on other grounds*, *State v. Shipp.* 116 P.3d 317, 2005 UT 35.

Preservation: Defense counsel moved for a mistrial during the course of trial. R. 294:295-296. The trial court denied the defendant's motion. R. 294:297.

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The texts of the following relevant constitutional and statutory provisions are contained in this brief or Addendum A:

Utah Code Ann. § 76-6-302

Utah Code Ann. § 76-6-1105(b)(I)

Utah Code Ann. § 77-17-11

Utah Code Ann. § 77-18a-1(1)(a)

Utah Code Ann. § 78A-4-103(2)

Utah R. App. P. 3(a)

Utah R. App. P. 23B

Utah R. Crim. P. 17(j)

STATEMENT OF THE CASE

On or about November 7, 2007, the State filed an Information against Tevita F. Tafuna, which alleged the crimes of Aggravated Robbery, a first degree felony; and Purchase, Transfer, Possession or Use of a Dangerous Weapon by a Restricted Person, a class A misdemeanor. R 1-4. On November 16, 2007, an Amended Information was filed; however, the charges were not significantly modified for purposes of appeal. R. 6-9.

Mr. Tafuna's case proceeded to trial on October 22, 2008. After a three-day trial, the jury convicted Mr. Tafuna of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302. R. 203; 290:57-59. The dangerous weapon charge was dismissed upon the Defendant's motion. R. 189; 294:326. At sentencing, the court

imposed, *inter alia,* an indeterminate term of five years to life at the Utah State Prison. R 291:10.

STATEMENT OF THE FACTS

On October 27, 2007, Mr. Tafuna attended a Halloween party, hosted by Grant Wolmuth, his brother, Joel, and Mark McMillian. R. 295:11-18. Mr. Tafuna arrived with two acquaintances, PJ Valdez and Rochelle Noble. R. 295:16.

Grant testified that people were using alcohol and marijuana at the party, including Mr. Tafuna. R 295: 71. While Mr. Tafuna was in the kitchen socializing, a commotion broke out in a nearby bedroom. R. 295:18. Mr. Tafuna heard someone yell something and everyone in the kitchen started to gravitate towards a nearby hallway. R. 295:21. Tafuna proceeded to the hallway with the crowd. R. 295:21; 295:40. Although several people were in front of Mr. Tafuna, his height enabled him to see over their heads. R. 295:21. Mr. Tafuna saw and heard a heated argument ensuing between PJ and numerous other individuals. R. 295:22.

Fearing for PJ's safety, Mr. Tafuna moved through the crowd to get closer to the commotion. R. 295:22. He entered the bedroom and asked what was going on. R. 295:22. Tafuna was told it was none of his business. R. 295:23.

Nevertheless, he tried to neutralize the situation. He wanted to get PJ out of there. R. 295:23. A male dressed as a pirate told Mr. Tafuna that he could not leave. R. 295:23. Mr. Tafuna replied that he was going to leave because he didn't have anything to do with

the argument and he was just concerned for PJ's safety. R. 295:24. The male dressed as a pirate then reasserted that Mr. Tafuna could not leave and brandished a knife. R. 295:24. The knife appeared to be a real knife. R. 295:24-25. After Tafuna's own life was threatened, he focused on his personal well-being. R. 295:40, 42, 43.

To protect himself, Mr. Tafuna picked up a pocketknife that he found in the bedroom. R. 295:25; 295:41. Tafuna opened the pocketknife and told everybody to get back. R. 295:25. Mr. Tafuna then fled downstairs and out the back patio. R. 395:28; 295:26. Once in the backyard, Mr. Tafuna continued in his attempts to escape. He located a gate, but couldn't get it open. R. 295:27. Mr. Tafuna was unable to open the gate due to the angry mob that was following him. R. 295:27. Tafuna displayed the knife in a defensive way to try to keep people away from him. R. 295:53-54.

Eventually, the gate opened. R. 295:29. Mr. Tafuna ran through the gate towards his car. R. 295:29. Upon reaching the driveway, Mr. Tafuna threw away the knife. R. 295:29. However, as he reached for the car door, he was grabbed from behind. R. 295:30. Tafuna was unable to see who grabbed him. R. 295:30. His arms were locked behind him and he was forced away from the vehicle. R. 295:31-32.

Figuratively and almost literally, Tafuna was blind-sided with a hit to his eye. R. 295:32. He could not see out of his injured eye. R. 295:32. (At the time of the trial, Mr. Tafuna still experienced permanent damage to his vision. R. 295:33.) After being

assaulted, Mr. Tafuna continued to struggle with his attacker. R. 295:33. He eventually broke free and started running down the street. R. 295:34.

As Mr. Tafuna was trying to run away, he was pushed from behind. R. 295:34. Mr. Tafuna tumbled down the sloped ground. R. 295:34. Upon regaining his balance, Mr. Tafuna continued to try to get away. R. 295:34. A group of five or six people continued to chase Mr. Tafuna. R. 295:35. Mr. Tafuna was thrown to the ground again. R. 295:35. The angry mob punched, kicked, and beat Tafuna, R. 295:35, with some discussion voiced over how they were going to attack him. R. 295:36.

Badly injured, Mr. Tafuna was unable to get up. R. 295:36-37. He was bleeding from his eye and shoulder. R. 295:37. Eventually, the violence subsided and the mob dispersed. R. 295:36. A male helped Mr. Tafuna get up and escorted him into the vehicle. R. 295:36.

The State witnesses portrayed a much different picture of what happened.

Mark Buyer testified that while receiving a tour of the residence by Grant Wolmuth, Grant opened the door to his bedroom. R. 294:18. Mr. Buyer was right behind Grant. R. 294:18. Once the bedroom door was opened, Mr. Buyer said that both PJ Valdez and Mr. Tafuna were inside the bedroom. R. 294:18. PJ Valdez appeared to be stealing things. R. 294:19. Mr. Buyer also stated that the knife came from Mr. Tafuna's pocket. R. 294:13.

Another person near the scene, Cody Fehr, testified that he focused on PJ Valdez, the person who had the stolen property. R. 294:44. Mr. Fehr, who had consumed alcohol and marijuana that evening, R. 294:27, stated that PJ Valdez went down the stairs before Mr. Tafuna. R. 294:31-32. Mr. Fehr then went into the backyard by the gate where he saw about ten people surrounding Mr. Tafuna and PJ Valdez. R. 294:33. Mr. Fahr thought that Mr. Tafuna was guarding PJ Valdez as Mr. Tafuna kept the crowd at bay by displaying the knife. R. 294:34. Upon opening the gate, PJ Valdez ran to the vehicle, and put stolen items in the car. R. 294:35. Mr. Fehr later retrieved the stolen items from the vehicle. R. 294:35. Mr. Fehr testified that because he couldn't hold both the stolen property and a knife, the knife slipped out of his hand. R. 294:52. After putting the items inside, Mr. Fehr went back outside where he witnessed PJ Valdez stab Joel Wolmuth. R. 294:37. Mr. Fehr also stated that PJ Valdez stabbed TC Vasquez. R. 294:49.

Ms. Gallo testified that as Mr. Tafuna was exiting the house, he was carrying a black backpack. R. 294:65. Ms. Gallo also stated that PJ Valdez stabbed her boyfriend Shawn Biel. R. 294:70.

Another witness who had consumed alcohol and hallucinogenic mushrooms on the date of the incident, Shawn Biel, testified that Mr. Tafuna came down the stairs after PJ Valdez. R. 294:79. Mr. Biel stated that after exiting the backyard, Mr. Tafuna was carrying a circular bag. R. 294:81. Mr. Biel admitted to throwing Mr. Tafuna to the ground two times. R. 294:82-84. Biel kicked and punched Mr. Tafuna, R. 294:93,

although he claimed that Mr. Tafuna still had a knife. Biel was stabbed in the back while he was attacking Tafuna, who was still on the ground. R. 294:84-86. The State acknowledged that the co-defendant, PJ Valdez, was responsible for the stabbings and that he was charged accordingly. R 291:4.

At the conclusion of the three-day trial, the jury convicted Mr. Tafuna of Aggravated Robbery, a first degree felony. R. 203; 290:57-59.

SUMMARY OF THE ARGUMENT

Error occurred when a juror engaged in improper contact with a witness. "[T]he burden is on the prosecution to prove that the unauthorized contact did not influence the juror." *State v. Pike*, 712 P.2d 277, 281 (Utah 1985); *id.* at 280 ("improper contacts may influence a juror in ways he or she may not even be able to recognize"); *see also State v. Swain*, 835 P.2d 1009, 1011 (Utah Ct. App. 1992) ("mere denial of prejudice by the tainted juror is . . . insufficient to overcome the presumption of prejudice.").

> Some jurisdictions have held that such [juror/witness] conversations do not fatally affect the impartiality of the jury unless the defendant can show that actual prejudice resulted from the contact. This Court, however, has enunciated a more stringent rule in recognition of the fact that prejudice may well exist even though it is not provable and even though a person who has been tainted may not, himself, be able to recognize that fact.

Pike, 712 P.2d at 281 (citations omitted). Due to the unique burden shifting requirement of *Pike* and the circumstances in this case, the trial court erred in not excluding the juror from deliberations. Alternatively, Mr. Tafuna submits that counsel performed deficiently and prejudicially in not appropriately moving to exclude the juror.

Prior to trial, the parties also agreed to exclude from the jury any reference connecting the defendant to a jacket or to identification found within the jacket because of the unsubstantiated inference of theft or that he was in unlawful possession of another person's property. Contrary to such an agreement, however, State witnesses later expressly tied him to the jacket, together with the accompanying innuendos and improper inferences. The trial court should have granted a mistrial as the parties could not undo the damage or cure the inadmissible reference. *Bruton v. United States*, 391 U.S. 123, 129 (1968) (citation omitted) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."). In a case where conflicting and irreconcilable facts were presented to the jury, impugning the defendant's character improperly misguided the jury's deliberations and, as conceded by the State, it would have been difficult to cure the error or to "un-ring the bell."

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN FAILING TO EXCUSE A JUROR WHO COMMUNICATED WITH THE STATE'S WITNESSES

It is well-settled law that, "Anything more than the most incidental contact during the trial between witnesses and jurors casts doubt upon the impartiality of the jury and at best gives the appearance of the absence of impartiality." *State v. Pike*, 712 P.2d 277, 280 (Utah 1985). Such improper contact results in the attachment of a rebuttable presumption of prejudice because it has the effect of "breeding a sense of familiarity that could clearly affect the juror's judgment as to credibility." *Pike*, 712 P.2d at 281; *cf.* Utah

R. Crim. P. 17(j); Utah Code Ann. § 77-17-11 (officer in charge of jury in deliberations shall "not permit any person to speak to or communicate with them or to do so himself except upon the order of the court).

As explained by our supreme court, even relatively innocuous circumstances that involve contacts between a juror and witness are unacceptable:

> In *State v. Anderson*, 65 Utah 415, 237 P. 941 (1925), a juror rode to and from the courthouse with one of the prosecution witnesses. The trial judge denied a motion for a new trial because the prosecution witness did not intend to influence the juror, and the juror, by affidavit, stated he had not discussed the trial, nor had he been influenced in his judgment in voting on the verdict.
>
> On appeal, this Court held that it could not "be said that appellant had the full benefit of trial by an impartial jury and was in no way influenced except by the evidence and the instructions of the court...." *Id.* at 419, 237 P. at 943. The Court stated that one reason for the presumption is the inherent difficulty in proving how or whether a juror has in fact been influenced by conversing with a participant in the trial. *Id.*
>
> Another reason for the presumption is the deleterious effect upon the judicial process because of the appearance of impropriety. In *Glazier v. Cram*, 71 Utah 465, 267 P. 188 (1928), we held that the mingling of jurors and prominent witnesses could not be condoned because "it is probable that a doubt must and will continue to exist in the mind of the losing party and that of his friends as to whether or not he had a fair trial." *Id.* at 470, 267 P. at 190. *Accord State v. Crank,* 105 Utah at 268, 141 P.2d 178, 194 (1943) ("In such instances, the verdict of the jury, like Caesar's wife, must be above suspicion.") (Emphasis in original.)
>
> Due consideration for the potential and often unprovable tainting of a juror by contacts between jurors and others involved in a trial that are more than brief and inadvertent encounters, leads us to reaffirm the proposition that a rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact. The possibility that improper contacts may influence a juror in ways he or she may not even be able to recognize and that a defendant may be left with questions as to the impartiality of the jury,

> leads to the conclusion that when the contact is more than incidental, the burden is on the prosecution to prove that the unauthorized contact did not influence the juror.

State v. Pike, 712 P.2d 277, 280 (Utah 1985) (footnote omitted).

Noteworthy in the *Pike* opinion were the nature of the cited facts from *Anderson* that warranted reversal and a new trial. The juror in *Anderson* merely "rode to and from the courthouse with one of the prosecution witnesses" but the juror and witness "had not discussed the trial." *Pike*, 712 P.2d at 280. Despite the apparent innocuous circumstance of the juror and witness simply being together for a brief period of time, the *Anderson* opinion questioned whether defendant Anderson "had the full benefit of trial by an impartial jury...." *Id.*

The *Pike* factual circumstances appeared equally innocuous. The *Pike* jurors and a witness did nothing more than discuss an incident (unrelated to the ongoing trial) regarding cleaning a patio that caused him to limp.

> In this case, an important prosecution witness, who was both the arresting officer and a witness at the scene of the altercation, engaged in conversation in the hall of the courthouse during a recess with three jurors regarding a personal incident, i.e., an accident he had sustained while cleaning his patio which caused him to limp. Immediately after the court reconvened, the trial court questioned the officer in camera on the record about the conversation. The questioning was brief and did not disclose the entire contents of the conversation. There is no other evidence as to the scope and subject matter of the conversation since a transcript of the post-verdict questioning of the jurors has not been provided on this appeal. From what is reported in the transcript of the first hearing on the matter, the conversation amounted to more than a brief, incidental contact and no doubt had the effect of breeding a sense of familiarity that could clearly affect the jurors judgment as to credibility. It was sufficient to warrant a presumption of prejudice. Indeed, even if the jurors had denied that they were influenced by the encounter in

> the post-trial hearing, that is not enough to rebut the presumption of prejudice. Accordingly, the conviction must be reversed and the matter remanded for a new trial.

Pike, 712 P.2d 277, 281 (Utah 1985). Even with the exchange of seemingly innocuous personal matters, the supreme court adhered to a heightened analytical standard:

> Some jurisdictions have held that such conversations do not fatally affect the impartiality of the jury unless the defendant can show that actual prejudice resulted from the contact. This Court, however, has enunciated a more stringent rule in recognition of the fact that prejudice may well exist even though it is not provable and even though a person who has been tainted may not, himself, be able to recognize that fact.
>
> The rule in this jurisdiction is that improper juror contact with witnesses or parties raises a rebuttable presumption of prejudice.

Pike, 712 P.2d at 280 (citations omitted).

The facts in *Pike* and *Anderson* are similar to the alleged innocuous conduct in Mr. Tafuna's case. At first blush the situation may appear innocent -- as suggested by the trial court -- but the heightened scrutiny mandated by *Pike* reveals that the juror/witness contact here was equally improper and on par with the cited factual violations.

During Mr. Tafuna's trial proceedings, one of the jurors improperly communicated with State witnesses about medication, prolonged waiting due to court delays, the weather, and airport carpeting:

> THE COURT: It has come to our attention you were talking to some witnesses from the prosecution's side there and it's something we just can't do. So the question I have for you, I have to look into it –
>
> JUROR: Yes. Yes.

THE COURT: How did you come to talk to them?

JUROR: Well, you know. I have got a lot of meds with me, obviously, we were discussing it this morning. Monday when I came through security, no problem. This morning, no problem. This afternoon they wanted to look at everything, which is great, it is just makes it safer for me and I don't care. But it did make me a bit late coming upstairs.

I saw these people and I thought, well, I saw those people this morning. I thought they were fellow jurors, they weren't. I turned on the wrong hallway. I recall the only thing we discussed down there – I got this – we're waiting there and had been waiting. One of the first guys said, "I have been here since 8:00 this morning." And I said, "Well, you could be in someplace like Chicago in a airport, you know, with a blizzard." So it's – we were discussing airport carpeting. We realized the mistake and that's all we discussed.

Maybe two minutes, that's the entire conversation that we had.

THE COURT: Anything else happen?

JUROR: No.

THE COURT: Okay. Thank you.

JUROR: Yes. I apologize for screwing this up.

THE COURT: Your apology is accepted.

JUROR: It ain't going to happen again, I'll guarantee you that.

THE COURT: Before you leave, anybody want to ask any questions?

MR. JANZEN: No. No.

THE COURT: Okay. Thank you. Thank you, Thank you.

(Whereupon the juror exited chambers.)

R. 289 at 3-4.

The above type of cursory court questioning did not rebut the presumption of prejudice. *State v. Swain*, 835 P.2d 1009, 1011 (Utah Ct. App. 1992) ("mere denial of prejudice by the tainted juror is . . . insufficient to overcome the presumption of prejudice."). In fact, the plain language of the colloquy revealed that the lower court did not even explore whether the juror's judgment would be impaired. *Cf. State v. Shipp*, 86 P.3d 763, 2004 UT App 40, ¶ 16, *rev'd on other grounds*, *State v. Shipp.* 116 P.3d 317, 2005 UT 35.

Further, the court erred in simply assuming that the juror would likely not "be influenced in any way pro or con[,]" R 289:5, yet it twice passed up the opportunity to actually ask him about it. *Id.* The juror may have indeed felt bad about the improper contact, but such an emotion is an issue separate and apart from the court's duty to analytically confirm and determine whether a "biasing influence" resulted, *Shipp*, 2004 UT App 40, ¶ 14, or whether it bred a "sense of familiarity that could clearly affect the jurors judgment as to credibility." *Pike*, 712 P.2d at 280. Because of the improper contact, the encounter was presumed to affect the juror's ability to assess the witness's credibility, absent the prejudice being rebutted. *Id.* It was not rebutted here.

This Court's analysis from *Shipp* lends guidance to Mr. Tafuna's case. Although our high court reversed *Shipp* for a procedural basis inapposite to Mr. Tafuna's situation, the rationale underlying the *Shipp* intermediate opinion bears repeating:

> [One, even assuming a witness's] "apparent passiveness in the conversation[,] . . . the *Pike* rule is concerned with the biasing effect on the juror, not the witness's or the State's fault in the matter. We have previously held a conversation instigated by a juror to be improper and to raise a presumption of prejudice." 2004 UT App. 40 ¶ 40.
>
> [Two, contrary to a State contention] "that the conversation was 'so brief and unrevealing that no reason exists to presume the encounter affected [the juror's] ability to assess the [witness's] credibility[,]'. . . the *Pike* rule is concerned not only with the biasing influence on the juror herself, but also with the 'deleterious effect upon the judicial process because of the appearance of impropriety.' Further not only the subject matter, but also the scope of the conversation, are irrelevant in determining whether the presumption of prejudice attaches."

State v. Shipp, 86 P.3d 763, 2004 UT App 40, ¶¶ 13, 14 (citing *State v. Pike*, 712 P.2d 277 (Utah 1985); *State v. Swain,* 835 P.2d 109 (Utah App. 1992); *Logan City v. Carlsen*, 799 P.2d 244 (Utah App. 1990)); *see also Logan City*, 799 P.2d 224 (Orme, J. concurring) (citing *State v. Erickson*, 749 P.2d 620 (Utah 1987) ("As *Erickson* makes clear, any contact 'more than a brief, incidental contact where only remarks of civility [are] exchanged,' gives rise to a presumption of prejudice, and therefore to an order of reversal, which cannot be overcome even with testimony by the 'tainted' juror that he or she was not 'influenced by the encounter.'").

The trial court and the parties appeared captured by the subject matter of the juror's explanation or even his credibility and emotion. However, the rambling,

disjointed summary by the juror suggested that his actual discussions about medication, court delays, the weather, and airport carpeting extended beyond "two minutes." Moving from one subject matter to the next, unlike the abrupt lack of transition suggested by the juror, probably involved a greater level of banter in their conversations with each side volunteering information that kept their exchange going. Regardless, since scope and subject matter constituted irrelevant considerations to the trial court's inquiry, *id.*, the court's colloquy did not appropriately address, let alone rebut, the presumption of prejudice. *State v. Pike*, 712 P.2d 277, 281 (Utah 1985) (the situation in *Pike*, like in Mr. Tafuna's case, involved a "conversation [that] amounted to more than a brief, incidental contact and no doubt had the effect of breeding a sense of familiarity that could clearly affect the jurors judgment as to credibility").

Moreover, even taking the juror's statements at face value, abbreviated discussions nevertheless trigger "the inherent difficulty in proving how or whether a juror has in fact been influenced by conversing with a participant in the trial[,]" together with "the deleterious effect upon the judicial process because of the appearance of impropriety." *Pike*, 712 P.2d at 280; *see also* R 317 (of heightened concern in Mr. Tafuna's case was that Juror #20, who had engaged in the discussions with the witnesses, not only participated in the deliberations, he ultimately became the jury Foreperson).

Due to the unique burden shifting requirement of *Pike* and the circumstances of this case, the trial court erred in not appropriately turning to the State to deal with the

element of prejudice. "[A] rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact ... [and] the burden is on the prosecution to prove that the unauthorized contact did not influence the juror." *Pike*, 712 P.2d at 281; *id.* at 280 ("improper contacts may influence a juror in ways he or she may not even be able to recognize"); *see also State v. Swain*, 835 P.2d 1009, 1011 (Utah Ct. App. 1992) ("mere denial of prejudice by the tainted juror is . . . insufficient to overcome the presumption of prejudice."); *State v. Shipp.* 116 P.3d 317, 2005 UT 35 (presumption of prejudice applies where, as here, the juror/witness contact occurred after voir dire and jury selection).

After the court's colloquy with the juror, the State suggested using an alternate juror to remedy the situation. R 289:5. The State did not address its burden because it was never directed to, although its suggested remedy was essentially to assume, *arguendo*, that the juror was tainted and that an alternate would remove the taint and cure the problem. However, because the court declined to do so then pursuant to the State's suggestion, R 289:5, and again later before the close of trial at the urging of defense counsel, R 290:55-56,[1] the issue seems more befitting of a trial court error than under an

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[1] When the improper juror/witness contact was brought to the court's attention, it stated, "It has come to our attention you were talking to some witnesses from the prosecution's side there and it's something we just can't do." R 289:3 (emphasis added). Fresh in its mind, the court recognized that the juror was not allowed to talk to prosecution witnesses even though the court later claimed that the juror did not "know who they were." R 290 at 56. To clarify, the juror thought the people he spoke with "were fellow jurors, they weren't[,]" R 289:3, which did

IAC classification. Of note, had such a remedy occurred, the alternate jurors expressed that they would not have convicted Mr. Tafuna. R 290:61-62.

Alternatively, Mr. Tafuna submits that prior defense counsel provided ineffective assistance of counsel ("IAC") in not timely recognizing or appropriately raising this issue with the trial court. *Myers v. State*, 2004 UT 31, ¶ 20, 94 P.3d 211 ("To establish ineffective assistance of counsel, 'a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'").

Counsel attempted to re-raise the issue later in the proceedings, but the trial court declined to further consider the issue due to the earlier lack of objection. R 290 at 55-56. In addition to defense counsel arguably inviting error or waiving the matter by not appropriately objecting, R 289:5, the appellate review process[2] was hampered because the prosecution also was not put to its burden to establish the lack of prejudice. The above authority reflects unreasonably deficient performance by defense counsel. Under Utah's stringent rule, prejudice was also established as a new trial should have been granted.

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nothing to detract from his improper contact with "some witnesses from the prosecution's side."

[2] Pursuant to Utah R. App. P. 23B, Mr. Tafuna moved unsuccessfully to remand the case to the trial court to factually address such matters.

POINT II. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER A STATE WITNESS INFORMED THE JURY OF PREVIOUSLY EXCLUDED AND INADMISSIBLE INFORMATION

Prior to the start of trial, the State and counsel for Mr. Tafuna stipulated to the exclusion of information that connected the defendant to the contents of a jacket:

MR. SIMMS: The only other two stipulations that we have is we are not going to talk about a gun that Mark McMillan had, it's not really relevant to the case.

MR. PLAYER: Right.

MR. SIMMS: And then there is also a fake ID – well, people's IDs found in that leather jacket. We won't talk about, speculate as to whose IDs they are and what –

THE COURT: Is that going to come out at all?

MR. PLAYER: No.

MR. SIMMS: No.

R. 294:174

Despite those earlier representations, at trial the State's case manager, Detective Kodie Gill, disclosed to the jury the previously excluded information about the identifications.

MR. JANZEN: Okay. With regards to your investigations did you have an opportunity to receive property after the October 27th?

DET. GILL: Yes.

MR. JANZEN: And what in particular did you receive?

DET. GILL: A couple of iPods, a cellphone, a leather coat, a wallet inside the leather coat with several people – several different people type IDs.

R. 294:292. Unfortunately, the Detective's statement, together with the testimony by Mr. Marty Newbury, tied the jacket to the defendant.

MR. PLAYER: Is there anything left in your car that was there when you got to the party?

MR. NEWBURY: A jacket.

MR. PLAYER: And do you know how that jacket got to your car?

MR. NEWBURY: My cousin TC went to go get my iPod – or his iPod from my car and as he was going to my car [Tevita] was asking him where he could put his coat. My cousin told – TC told him that he would take it for him. And then the next day I got in my car and it was in my car.

MR. PLAYER: When do you discover this jacket in your car?

MR. NEWBURY: The next morning.

MR. PLAYER: Now, do you know at that time whose jacket that is?

MR. NEWBURY: I believe it's [Tevita's] jacket. Because, like I said, he was asking where he could put it.

MR. SIMMS: I'll object to speculation as to whose jacket it is.

THE COURT: Sustained.

R. 294:151.

MR. PLAYER: I want to show you what's been marked as State's Exhibit 35. Do you recognize this jacket?

MR. NEWBURY: I do.

MR. PLAYER: Where did you see this jacket?

MR. NEWBURY: The Defendant was wearing it.

MR. PLAYER: The Defendant was wearing this jacket?

MR. NEWBURY: Yeah, that's the jacket he gave to my cousin and my cousin put it in my car.

MR. PLAYER: So you saw him wearing it at the party?

MR. NEWBURY: Yes.

MR. PLAYER: And that's the same jacket TC gave you?

MR. NEWBURY: It's the jacket TC put in my car.

MR. PLAYER: Okay. And that is – is that the jacket that you found in your car?

MR. NEWBURY: Yes.

MR. PLAYER: And that you returned to Sandy Police Department?

MR. NEWBURY: Yes.

R. 294:163.

The State admitted that they failed to inform Detective Gill of the stipulation to exclude all references to the identifications:

THE COURT: Please be seated. First of all, how did that happen?

MR. JANZEN: Your Honor, we failed to mention that to the officer that was an issue that we discussed beforehand. We didn't [expect] that to come out.

THE COURT: Okay.

MR. SIMMS: We move for a mistrial, Your Honor.

R. 294:295-296. The trial court denied the defendant's motion for a mistrial, R. 294:297, notwithstanding the *prosecutor's* expressed acknowledgment that, "I don't know if a jury instruction could correct this error." R 294:296.

In a failed attempt to remedy the State's lack of instruction and the prejudice caused by the admission of the previously excluded information, the State withdrew the jacket, State's Exhibit 35 and the court instructed the jury.

MR. PLAYER: ...[U]pon further review and consideration the State has determined that it is going to withdraw State's Exhibit 35, as it is not related to this case.

THE COURT: All right.

• • •

THE COURT: It's just the same as if it were stricken. The jacket that came in you're not to – you're to disregard any testimony relating to it or – to the jacket or anything that was found in the jacket. And it's stricken and it is as if it were never entered into the record at this point.

R 295:14.

Despite the trial court's order to disregard the jacket reference, the claimed "cure" of a limiting instruction cannot un-ring the "ringing of the bell" or the improper admission of inadmissible evidence. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ." *Bruton v. United States*, 391 U.S. 123, 129 (1968) (citation omitted). "The

fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore become a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." *Id.*

Moreover, defendant's possession of such identifications suggested more than improperly possessing another person(s) identification, it also carried the equally damaging label of being a crime of dishonesty. *See* Utah Code Ann. § 76-6-1105(b)(I) (a person in possession of "multiple identifying documents with knowledge that he is not entitled to obtain or possess the multiple identifying documents" is guilty of a third degree felony). In a case where conflicting and irreconcilable facts were presented to the jury (and Mr. Tafuna testified), impugning the defendant's character improperly tainted its deliberation process. *State v. Burk*, 839 P.2d 880 (Utah App., 1992) (citations omitted) ("Evidence is unfairly prejudicial: if it has a tendency to influence the outcome of the trial by improper means, or if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case."). Mr. Tafuna asks this Court to reverse his conviction and to remand the matter for a new trial.

POSITION ON ORAL ARGUMENT

Oral argument is requested. This Court may be aided in its decision-making process by the parties' participation and responses during oral argument.

CONCLUSION

Mr. Tafuna respectfully requests that this Court reverse his conviction and remand his case for a new trial.

SUBMITTED this 21 day of March, 2011.

Ronald S. Fujino
Attorney for Mr. Tafuna

CERTIFICATE OF DELIVERY

I hereby certify that I have caused the original and seven copies of the foregoing to be hand-delivered to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 21 day of March, 2011.

Addendum A

(Statutes, Rules, and Constitutional Provisions)

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Const. art I, § 12 [Rights of accused persons.]

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.
>
> Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Code Ann. § 77-18a-1 Appeals -- When proper.

> (1) A defendant may, as a matter of right, appeal from:
>
> (a) a final judgment of conviction, whether by verdict or plea;

Utah Code Ann. § 76-6-302. Aggravated robbery

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
>
> (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;
>
> (b) causes serious bodily injury upon another; or
>
> (c) takes or attempts to take an operable motor vehicle.

they have agreed on a verdict. He shall return them to court when they have agreed and the court has so ordered, or when otherwise ordered by the court.

Utah Code Ann. § 78A-4-103

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of

...

(j) cases transferred to the Court of Appeals from the Supreme Court.

Utah R. App. P. 3(a). Appeal as of right: how taken.

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

Utah R. App. P. 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) Grounds for motion; time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

Utah R. Crim. P. 17(j)

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.